

1 to put in now?

2 MR. KNOWLES-KELLETT: There is a good number of  
3 them that we are going to be dealing with, Your Honor.

4 JUDGE CHACHKIN: So you are telling me even though  
5 he produced 369 pages, you do not consider that acting in  
6 good faith by producing 369 pages?

7 We are going back to the 1980s, and the fact that  
8 for some reason some were mislaid or not turned over to you  
9 is somehow a bad faith that you are asking me to reject it  
10 at this point?

11 MR. SHAINIS: Your Honor, Mr. Kay would also have  
12 no reason to withhold these documents.

13 JUDGE CHACHKIN: Of course not. What point would  
14 there be to withhold documents? What reason would Mr. Kay  
15 have to withhold these documents when he gave you 369 pages?

16 MR. KNOWLES-KELLETT: You know, Your Honor, Kay's  
17 conduct in this proceeding has been totally irrational, in  
18 my opinion. He has stumbled at every step of the way, and  
19 he has repeatedly just stalled in discovery.

20 JUDGE CHACHKIN: Well, I have heard enough. I am  
21 going to receive this. I think no prejudice has been shown.  
22 Good faith has been shown by Kay by providing 369 pages of  
23 Forest Service documents.

24 The fact that a few for some reason were not  
25 supplied, there is no showing that it was done deliberately.

1 In fact, the fact that 369 pages were supplied would  
2 indicate that it was an oversight at the most. There was  
3 nothing to be gained by Kay by not producing those  
4 documents.

5 Under those circumstances, in view of the fact  
6 there is an issue in this case, I will receive this  
7 material. What are we dealing with now?

8 MR. SHAINIS: Kay Exhibit 15.

9 JUDGE CHACHKIN: Kay Exhibit 15. If that is your  
10 objection --

11 MR. SCHAUBLE: Your Honor, I guess --

12 MR. SHAINIS: What we were talking about was  
13 Exhibit 14.

14 JUDGE CHACHKIN: All right. Exhibit 14 is  
15 received.

16 (The document referred to,  
17 having been previously marked  
18 for identification as Kay  
19 Exhibit No. 14, was received  
20 in evidence.)

21 JUDGE CHACHKIN: 15? Any objection?

22 MR. SCHAUBLE: Your Honor, may I inquire of  
23 counsel for Kay the purpose for which this document is being  
24 offered?

25 JUDGE CHACHKIN: That is a reasonable inquiry.

1 MR. KELLER: I believe, Your Honor, and again I  
2 apologize. In Mr. Kay's absence, I cannot tell you for  
3 sure. I believe again this document, this whole series of  
4 exhibits we are on here, are related to the construction  
5 issue.

6 Upon finally learning the specific call signs  
7 involved, Kay then went back to see if we had any way of  
8 documenting items which might if not conclusively prove, at  
9 least provide evidence of construction at those various  
10 sites. This is one such document.

11 Without Mr. Kay here to consult with, I cannot  
12 tell you precisely how, but Mr. Kay will testify regarding  
13 this document, will sponsor this document and will explain  
14 how it goes to provide some evidence that one or more of the  
15 sites in question were in fact constructed at a certain  
16 period in time.

17 JUDGE CHACKIN: Was not constructed?

18 MR. KELLER: Was constructed.

19 JUDGE CHACKIN: Was constructed.

20 MR. SHAINIS: Your Honor, Lucky's Two-Way Radios  
21 is listed as an existing user of the site as a licensee.

22 MR. SCHAUBLE: Your Honor, all I see here is a  
23 series of --

24 MR. KELLER: Yes.

25 MR. SCHAUBLE: I also see a bunch of frequencies

1 for which Mr. Kay is proposed to operate.

2 MR. KELLER: No. Listed below down at the bottom,  
3 for example, is Lucky's Two-Way Radios. It also may well  
4 be. Again, I need Mr. Kay here to testify, but it also may  
5 well be, and I believe it is the case, that some of the  
6 non-Kay names that are listed on here may be Kay customers.

7 In other words, I can say look, even though I do  
8 not have a Forest Service permit or I do not have a lease to  
9 show you, I can show you that as of this date so and so was  
10 listed. There are other documents we have in some places  
11 that might be.

12 I mean, this is what we have had to do is go in  
13 and find service receipts or any kind of piece of paper we  
14 can because in every case there was not always a Forest  
15 Service permit.

16 MR. SCHAUBLE: Your Honor, perhaps what we should  
17 do here is withhold a ruling on this exhibit pending  
18 testimony from Mr. Kay to see if this could be tied in in  
19 some way.

20 JUDGE CHACHKIN: You are saying this is not  
21 relevant to the construction issue?

22 MR. KNOWLES-KELLETT: It depends how it is used,  
23 Your Honor. If it is used that he is a proposed user, we  
24 say no. If it is that he is an existing user --

25 MR. KELLER: Well, the document speaks for itself

1 in that regard.

2 JUDGE CHACHKIN: It is 1992.

3 MR. SCHAUBLE: 1987, I believe.

4 JUDGE CHACHKIN: 1987?

5 MR. SHAINIS: The document says existing users of  
6 record are Lucky's Two-Way Radios.

7 MR. SCHAUBLE: Instead of using it for that one  
8 particular frequency --

9 MR. KELLER: Well, I cannot say that because I do  
10 not know that some of the other people on here are not  
11 necessarily customers of Mr. Kay at the time, which he would  
12 independently testify to and/or document. The Lucky's  
13 Two-Way listing alone provides enough to make the document  
14 relevant and admissible.

15 As to each of these documents, Your Honor, the  
16 whole series wherein it goes up to about Exhibit I do not  
17 know the exact number, but the whole series of exhibits that  
18 were in, Mr. Kay will testify.

19 First of all, to the extent necessary he will  
20 authenticate the documents. He will give testimony which  
21 will relate the document to a specific transmitter site,  
22 call sign and what have you and will explain how the  
23 document provides some evidence, indication or in some cases  
24 perhaps even conclusive demonstration that facilities were  
25 constructed and operated at the sites at the particular

1 period of time, all of which would be relevant to the  
2 construction issue.

3 JUDGE CHACHKIN: Maybe the best thing then is to  
4 withhold the ruling until Kay testifies.

5 MR. KELLER: I have no problem with that. We have  
6 saved time by introducing it. Kay is going to be questioned  
7 about them at that point. Do you have a problem with that?  
8 I do not.

9 JUDGE CHACHKIN: I assume you are going to  
10 question Mr. Kay about each of these, about each of these  
11 documents. At that time --

12 MR. KELLER: Either I or Mr. Shainis will, yes.

13 JUDGE CHACHKIN: At that time I will make a  
14 ruling.

15 MR. KELLER: At that time we will move its  
16 admission, and the Bureau can object at that time if they --

17 JUDGE CHACHKIN: Whether it is relevant or not.  
18 It is not going to be rejected because it was not produced  
19 during discovery. It will only be rejected if it is not  
20 relevant.

21 The Bureau's objection to receipt of these  
22 exhibits on the grounds they were not produced at the time  
23 of discovery --

24 MR. SCHAUBLE: We are not raising that with  
25 respect to this, Your Honor.

1 JUDGE CHACHKIN: You are not raising that with  
2 this one? All right.

3 MR. SCHAUBLE: That is with respect specifically  
4 to Forest Service permits, Your Honor.

5 JUDGE CHACHKIN: All right.

6 MR. KELLER: I think to save time, Your Honor, we  
7 should just take the same approach.

8 JUDGE CHACHKIN: All right.

9 MR. KELLER: That is, withhold ruling all the way  
10 up through Exhibit 31.

11 MR. SHAINIS: Well, let's see if they have  
12 objections.

13 MR. KELLER: Okay.

14 JUDGE CHACHKIN: All right. Ruling withheld as to  
15 15.

16 What about 16?

17 MR. SCHAUBLE: Your Honor, again I think this  
18 would be something that would be appropriate to withhold  
19 ruling on.

20 Mr. Kay may be able through testimony to make this  
21 relevant, but I do not see on the face of it how. I do not  
22 see any specific frequencies here. I see a reference to  
23 Lucky's Two-Way Radio, a request for something.

24 JUDGE CHACHKIN: All right. As far as 16, a  
25 ruling will be withheld as to that.

1                   What about 17?

2                   MR. SCHAUBLE: Your Honor, 17 we have the same  
3 objection as stated with respect to Exhibit 14.

4                   JUDGE CHACHKIN: All right. That objection is  
5 overruled. Kay Exhibit 17 is received.

6                                   (The document referred to,  
7                                   having been previously marked  
8                                   for identification as Kay  
9                                   Exhibit No. 17, was received  
10                                  in evidence.)

11                  JUDGE CHACHKIN: 18? Any objection?

12                  MR. SCHAUBLE: No objection, Your Honor.

13                  JUDGE CHACHKIN: 18 is received.

14                                  (The document referred to,  
15                                  having been previously marked  
16                                  for identification as Kay  
17                                  Exhibit No. 18, was received  
18                                  in evidence.)

19                  JUDGE CHACHKIN: 19?

20                  MR. KNOWLES-KELLETT: This is a mixed exhibit,  
21 Your Honor. We have the same objection as to a portion of  
22 the exhibit, that portion which consists of Forest Service  
23 permits.

24                  MR. SCHAUBLE: There is also a series of radio  
25 station licenses in here, Your Honor. That portion we have



1 no objection to.

2 JUDGE CHACHKIN: All right. Kay Exhibit 19 is  
3 received.

4 (The document referred to,  
5 having been previously marked  
6 for identification as Kay  
7 Exhibit No. 19, was received  
8 in evidence.)

9 JUDGE CHACHKIN: 20?

10 MR. SCHAUBLE: No objection to 20, Your Honor.

11 JUDGE CHACHKIN: Kay Exhibit 20 is received.

12 (The document referred to,  
13 having been previously marked  
14 for identification as Kay  
15 Exhibit No. 20, was received  
16 in evidence.)

17 JUDGE CHACHKIN: 21?

18 MR. SCHAUBLE: Your Honor, I think Exhibit 21 may  
19 be something that requires testimony from Mr. Kay before we  
20 can definitively make a determination on it.

21 JUDGE CHACHKIN: What is your position, Mr.  
22 Keller, with respect to 21?

23 MR. KELLER: I have no objection to you  
24 withholding ruling pending voir dire.

25 JUDGE CHACHKIN: All right. Exhibit 21, ruling

1 withheld.

2 MR. SCHAUBLE: 22 is the same as 21, Your Honor.

3 JUDGE CHACHKIN: What do you mean, the same? 22  
4 also requires testimony?

5 MR. SCHAUBLE: The exhibit is exactly the same  
6 form as 21, Your Honor.

7 JUDGE CHACHKIN: All right. 22 will be withheld.  
8 Ruling withheld.

9 23?

10 MR. SCHAUBLE: I think 23 is essentially the same  
11 as 21 and 22. We ask that Your Honor withhold ruling.

12 JUDGE CHACHKIN: What is your position, Mr.  
13 Keller?

14 MR. KELLER: Well --

15 JUDGE CHACHKIN: Does it require Mr. Kay's --

16 MR. KELLER: I think this one is a little bit more  
17 obvious. It is a repeater service worksheet and some  
18 invoices and billing records. I mean, it is sort of  
19 self-explanatory in that it documents existing operations at  
20 the specified location during this time frame.

21 MR. KNOWLES-KELLETT: No objection, Your Honor.

22 JUDGE CHACHKIN: All right. 23 is received.

23 //

24 .//

25 //

1 (The document referred to,  
2 having been previously marked  
3 for identification as Kay  
4 Exhibit No. 23, was received  
5 in evidence.)

6 JUDGE CHACHKIN: 24?

7 MR. SCHAUBLE: No objection to 24, Your Honor.

8 JUDGE CHACHKIN: 24 is received.

9 (The document referred to,  
10 having been previously marked  
11 for identification as Kay  
12 Exhibit No. 24, was received  
13 in evidence.)

14 JUDGE CHACHKIN: 25?

15 MR. SCHAUBLE: No objection, Your Honor.

16 JUDGE CHACHKIN: 25 is received.

17 (The document referred to,  
18 having been previously marked  
19 for identification as Kay  
20 Exhibit No. 25, was received  
21 in evidence.)

22 JUDGE CHACHKIN: 26?

23 MR. SCHAUBLE: Your Honor, same objection as  
24 previously stated with respect to Exhibit 14.

25 JUDGE CHACHKIN: 26 is received.

1 (The document referred to,  
2 having been previously marked  
3 for identification as Kay  
4 Exhibit No. 26, was received  
5 in evidence.)

6 JUDGE CHACHKIN: 27?

7 MR. SCHAUBLE: Your Honor, just a question of  
8 inquiry to make sure.

9 The first two pages of what I have as Exhibit 27  
10 is a lease agreement, November 7, 1987, followed by a series  
11 of what appear to be a series of invoices. I just want to  
12 make sure that these are supposed to be part of the same  
13 exhibit.

14 MR. KELLER: It appears that way to me, but,  
15 without being able to consult with Mr. Kay, I can't say for  
16 sure.

17 MR. SCHAUBLE: Okay.

18 MR. KELLER: Is there some reason for you to  
19 question that?

20 JUDGE CHACHKIN: Well, in cross-examination we can  
21 find out from the witness. 27. No objection.

22 MR. KNOWLES-KELLETT: Your Honor, we take that  
23 back. No objection.

24 JUDGE CHACHKIN: To 27?

25 MR. KNOWLES-KELLETT: There was a d/b/a name that

1 we missed, and they appeared to be unrelated. They are  
2 related.

3 (The document referred to,  
4 having been previously marked  
5 for identification as Kay  
6 Exhibit No. 27, was received  
7 in evidence.)

8 JUDGE CHACHKIN: 28?

9 MR. SCHAUBLE: No objection, Your Honor.

10 JUDGE CHACHKIN: 28 is received.

11 (The document referred to,  
12 having been previously marked  
13 for identification as Kay  
14 Exhibit No. 28, was received  
15 in evidence.)

16 JUDGE CHACHKIN: 29?

17 MR. SCHAUBLE: No objection, Your Honor.

18 JUDGE CHACHKIN: 29 is received.

19 (The document referred to,  
20 having been previously marked  
21 for identification as Kay  
22 Exhibit No. 29, was received  
23 in evidence.)

24 JUDGE CHACHKIN: 30?

25 MR. SCHAUBLE: Your Honor, same objection as

1 previously stated with respect to Exhibit 14.

2 JUDGE CHACHKIN: 30 is received.

3 (The document referred to,  
4 having been previously marked  
5 for identification as Kay  
6 Exhibit No. 30, was received  
7 in evidence.)

8 JUDGE CHACHKIN: 31?

9 MR. SCHAUBLE: Your Honor, I think this might  
10 require some further testimony from Mr. Kay. This is  
11 labeled miscellaneous documents.

12 I see where this could possibly be relevant, but I  
13 think there is a need for some testimony from Mr. Kay on  
14 this in order to clearly establish.

15 JUDGE CHACHKIN: Mr. Keller?

16 MR. KELLER: Well, it is the same as I said  
17 before. I need to consult with Mr. Kay, but what I will  
18 note is that there is a program service worksheet, and it  
19 seems to designate a frequency. There are some invoice  
20 records here which indicate the dates of payments of certain  
21 U.S. Forest Service fees.

22 There is also a repeater agreement of a specified  
23 date that indicates service at a particular location to a  
24 particular customer; again, all of this providing some  
25 evidence of operations of a specific facility at a specific

1 time.

2 I have no problem one way or the other, but I  
3 think there is probably enough here to admit this as  
4 relevant.

5 MR. SCHAUBLE: Your Honor, there are parts that we  
6 see that are relevant. There are certain parts here that I  
7 am not sure are relevant. They could be relevant.

8 MR. KELLER: I have no major problem with  
9 withholding it just as long as it is not rejected.

10 MR. KNOWLES-KELLETT: We are not asking that it be  
11 rejected.

12 JUDGE CHACHKIN: All right. Ruling will be  
13 withheld on 31.

14 What about 32?

15 MR. SCHAUBLE: No objection, Your Honor.

16 JUDGE CHACHKIN: 32 is received.

17 (The document referred to,  
18 having been previously marked  
19 for identification as Kay  
20 Exhibit No. 32, was received  
21 in evidence.)

22 JUDGE CHACHKIN: 33?

23 MR. SCHAUBLE: No objection, Your Honor.

24 JUDGE CHACHKIN: 33 is received.

25 //

1 (The document referred to,  
2 having been previously marked  
3 for identification as Kay  
4 Exhibit No. 33, was received  
5 in evidence.)

6 JUDGE CHACHKIN: 34?

7 MR. KELLER: I believe we are now through that  
8 series of exhibits, and I think we are shifting into a  
9 different area.

10 MR. KNOWLES-KELLETT: May we inquire what purpose  
11 34 is?

12 MR. KELLER: 34 is being offered primarily, and  
13 Mr. Kay will give testimony. Mr. Kay already gave some  
14 testimony on direct examination, but he will probably give  
15 further testimony as our witness regarding the procedures  
16 that we went through in terms of evaluating the availability  
17 of channels, the loading on channels, which channels could  
18 or could not be applied for, which channels might be.

19 The FCC loading cards were certainly something  
20 that he used in that regard, so it will be offered, first of  
21 all, for those purposes.

22 To the extent that there are specific issues, and  
23 again this is something that has been lacking in this case  
24 is knowing specifically what particular stations, and it is  
25 that Mr. Kay may point to specific parts of this making



1 certain indications as to what was going on on a certain  
2 channel in the time frame that that covered.

3 Primarily it is being offered for demonstration  
4 and education purposes as to the types of documents he  
5 relied on in making determinations when he filed for certain  
6 applications.

7 These also, by the way, should be to some extent  
8 self-authenticating. They are copies of official loading  
9 cards that were maintained by the FCC in the pre-elimination  
10 of end user licensing data. I would also add that this is  
11 something that could be verified by the Bureau from Bureau  
12 records.

13 MR. KNOWLES-KELLETT: That is not correct, Your  
14 Honor. These documents we have maintained in effect were  
15 purged from our records back in 1992, and I think Mr. Kay is  
16 certainly aware of that. Mr. Keller raised that when we  
17 tried to enter loading cards in one of our exhibits that  
18 official notice could not be taken.

19 They now want to enter it for the purpose of  
20 showing that Hessman Security was to be loaded on Kay's  
21 repeater or was supposedly operating on Kay's repeater, but  
22 would not enter it for the value of the number of mobiles  
23 that could be operated, so there is a problem with taking  
24 official notice. I wonder. This really goes on what  
25 purpose it is offered for.

1 MR. SCHAUBLE: Your Honor, we object to these  
2 documents to the extent they are being offered for the  
3 purpose of showing that in fact these frequencies were  
4 loaded as described in these cards.

5 MR. KNOWLES-KELLETT: To the extent they are being  
6 offered to show Kay's method of finding things out, we have  
7 no problem.

8 JUDGE CHACHKIN: Are you limiting your offer?

9 MR. KELLER: Well, I cannot --

10 MR. KNOWLES-KELLETT: We can receive them for that  
11 limited purpose.

12 MR. KELLER: I cannot say for sure as to this  
13 particular exhibit. I know that we are going to have to  
14 address this issue anyway because there is a later exhibit  
15 where I may indeed want to offer it for at least the purpose  
16 of showing what Kay's belief was as to loading on a specific  
17 frequency at the time.

18 In other words, I am not saying that this shows  
19 that the frequency was or was not loaded, but it certainly  
20 shows that at the time Kay looked at this card, and, in  
21 fact, I will also say that the testimony will, and I will  
22 make this proffer. The testimony will show that Kay would  
23 have no knowledge as to whether it was or was not loaded.

24 What these documents provide Mr. Kay with is the  
25 fact that on certain channels, based on FCC records, certain

1 numbers of mobiles are authorized on certain frequencies,  
2 and that is what he has gone by. Now, whether those  
3 licensees are actually operating mobiles, Kay would have no  
4 way of knowing.

5 MR. KNOWLES-KELLETT: So does this go to the issue  
6 where Kay was trying to say that if somebody else had more  
7 mobiles, he did not have to --

8 MR. KELLER: It goes to that. It goes to certain  
9 other issues.

10 MR. KNOWLES-KELLETT: We disagree. That is  
11 irrelevant, Your Honor. The rule is clear that you have to  
12 have correct loading. I can explain to you very simply why.

13 If two people each have two mobiles on it and they  
14 both claim to have 95, it looks fully loaded to the world,  
15 and they can each rely on the other guy's 95 to say they are  
16 correctly loaded.

17 MR. KELLER: But the fact of the matter is a  
18 licensee has no way of verifying that at that time other  
19 than relying on the FCC records.

20 MR. KNOWLES-KELLETT: No.

21 MR. KELLER: If Joe Blow's service across town is  
22 licensed for 72 mobiles and he is in fact not operating,  
23 whether he is or is not in fact operating them, the  
24 Commission would not have accepted an application from me  
25 for ten mobiles.

1           MR. KNOWLES-KELLETT: But that does not excuse. I  
2   heard you to say he is offering as an excuse why he did not  
3   use from 150 to the 20 he was in fact operating. Is that  
4   what you are offering it for?

5           MR. KELLER: I do not know in each case until we  
6   get into it again until I have the witness here, but what I  
7   will see --

8           MR. KNOWLES-KELLETT: We do not think that is  
9   relevant.

10          MR. KELLER: What I will say is let's take the  
11   situation as follows. Let me give you another example where  
12   this might be offered.

13                 It also shows whether or not, without getting into  
14   the specific numbers even, the legitimacy of the specific  
15   numbers, it gets into issues about whether or not certain  
16   channels were in fact either a shared or an exclusive status  
17   at the time.

18                 In other words, if a specific frequency is shown  
19   in here as being licensed to three different SMR operators,  
20   that says something about the channel in terms of whether it  
21   was available for another licensee to apply for and, if so,  
22   under what terms.

23                 For example, if these cards show that three  
24   different licensees were authorized on the channel that  
25   authorized mobiles up to a count of say 62 mobiles, that

1 means a fourth licensee could have certainly come in and  
2 filed an application at that point, and that fourth license  
3 would only have to show proposed loading of ten more mobiles  
4 or eight more mobiles in that case, and at that point it  
5 would not matter whether the licensee had another unloaded  
6 station within 40 miles.

7 This is in fact a procedure that was followed by  
8 the Private Radio Bureau at the time in question, which is  
9 namely they would allow you to come in with an application  
10 and propose loading that you in good faith anticipated by  
11 the end of an eight month period. This goes to that.

12 I mean, it is one thing if I come in and propose,  
13 you know, 72 mobiles all of a sudden, but if I am only  
14 coming in and proposing eight mobiles and there are already  
15 62 other mobiles licensed; see, there is a whole permutation  
16 of different kinds of things that this potentially relates  
17 to.

18 The loading procedures are very complicated, and  
19 at a minimum these documents should come in to provide  
20 background evidence on that, but I certainly do not want to  
21 be precluded from relying on them for certain purposes.

22 What you are going to I think goes to the weight  
23 of them. If you are going to say gee, this may or may not  
24 be that way, then that is something you certainly have an  
25 opportunity to cross-examine Mr. Kay about.

1           If you establish that, you can certainly then  
2   argue to the Judge that if we argue it for that purpose then  
3   it has limited weight, but I do not think it is  
4   inadmissible.

5           MR. KNOWLES-KELLETT: I think it goes to  
6   relevance, too, Your Honor, for certain purposes. I agree  
7   with him entirely that there are certain legitimate purposes  
8   that this might be used for, so I ask that you withhold  
9   ruling for this limited purpose.

10          JUDGE CHACHKIN: Well --

11          MR. KNOWLES-KELLETT: This is an enormous exhibit,  
12   Your Honor. In keeping with your previous rulings, it is  
13   not clear that all of it is pertinent and relevant.

14          With respect to us, you asked us to designate  
15   exactly those portions which were relevant, and we did so  
16   with the Sobel transcript, with the motion to enlarge with  
17   respect to numerous exhibits.

18          MR. KELLER: In that regard, I will say here an  
19   effort was made. It has been since June when we were doing  
20   this. My brain was foggy even then, and I certainly do not  
21   remember now, but I know that with this particular exhibit  
22   even though it is large, there was an effort made to include  
23   loading cards that only went to frequencies that were  
24   co-channeled with Mr. Kay at the time in question.

25          To that extent, there was an effort to somewhat

1 limit the scope. I mean, we did not put in all the loading  
2 cards for the Los Angeles area.

3 MR. KNOWLES-KELLETT: But if I heard you  
4 correctly, you cannot tell us particularly today what the  
5 purpose of the particular cards are. Different situations  
6 have different purposes.

7 MR. KELLER: I cannot tell you that for two  
8 reasons. One, I do not have Mr. Kay here to do that.  
9 Number two, until we see how the testimony unfolds, we have  
10 to finish reviewing the Bureau's testimony now as it is on  
11 the record to find out which specific parts we are going to  
12 respond to in our case. For that reason, plus --

13 MR. KNOWLES-KELLETT: So you may not need all of  
14 this?

15 MR. KELLER: We may or may not. I do not know.

16 MR. KNOWLES-KELLETT: I would ask that you  
17 withhold ruling on it.

18 JUDGE CHACHKIN: I am going to receive 34. You  
19 can move to strike if it is not demonstrated it is relevant.  
20 I am satisfied, at least preliminarily, it is relevant.

21 (The document referred to,  
22 having been previously marked  
23 for identification as Kay  
24 Exhibit No. 34, was received  
25 in evidence.)

1 JUDGE CHACHKIN: 35?

2 MR. SCHAUBLE: No objection, Your Honor.

3 JUDGE CHACHKIN: 35 is received.

4 MR. SCHAUBLE: Actually, Your Honor, I mis-spoke.  
5 Pardon me, Your Honor.

6 I noticed there were two sponsoring witnesses  
7 listed for this exhibit, one of whom, Barbara Ashauer, has  
8 already testified. It appears some of this is in Mr. Kay's  
9 handwriting. It appears there are two different  
10 handwritings. Part of this may be Ms. Ashauer's.

11 MR. KELLER: I think I can cut to the chase here.  
12 This document might have at one time been offered for a  
13 broader purpose, but I can tell you right now it is being  
14 offered for the limited purposes of since there were some  
15 questions raised regarding the signature of Ms. Pfeifer, we  
16 now want to offer this just to provide some additional  
17 examples in our possession of her handwriting.

18 There is still an outstanding issue of locating  
19 certain Ms. Pfeifer documents that, of course, we need to  
20 take up with the Bureau, but this document Mr. Kay will be  
21 the sole sponsor of. It will be offered for the sole  
22 purpose of providing further examples of Ms. Pfeifer's  
23 signature, and I believe I checked with Mr. Kay a couple of  
24 days ago. I believe were it to become necessary for any  
25 reason, we could provide the originals of these documents.



1           MR. SCHAUBLE: Okay. Are you offering pages 1 and  
2   2, which do not contain Ms. Pfeifer's signature?

3           MR. KELLER: Well, those documents are useful only  
4   for verification purposes. They key in either a check stub  
5   or a ledger. They authenticate that these checks are in  
6   fact checks that were issued by Kay to Carla Pfeifer.

7           That is being offered solely for an aide in  
8   verifying the documents. I guess the checks sort of speak  
9   for themselves for that purpose, so I do not see any harm.  
10   Primarily the checks with the endorsements that we want into  
11   evidence. If you feel a need to strike pages 1 and 2, I  
12   guess I do not have a problem with that.

13          MR. SCHAUBLE: Your Honor, for the limited purpose  
14   indicated, we have no objection.

15          JUDGE CHACHKIN: All right. 35 is received.

16                               (The document referred to,  
17                               having been previously marked  
18                               for identification as Kay  
19                               Exhibit No. 35, was received  
20                               in evidence.)

21          JUDGE CHACHKIN: 36?

22          MR. SCHAUBLE: Objection, Your Honor. One, based  
23   on relevance. Two, based on lack of a sponsoring witness.  
24   Two of the sponsoring witnesses listed here are Barbara  
25   Ashauer and Roy Jensen. They are not going to be testifying

1 any further during this proceeding. I do not believe Mr.  
2 Jensen was asked any questions about this matter whatsoever.

3 I do not see where this is relevant to the  
4 designated issues, and I object to this exhibit on these  
5 bases.

6 JUDGE CHACKIN: Mr. Keller?

7 MR. KELLER: Your Honor, I believe Mr. Kay can  
8 sponsor this entire document. I am just seeing if there is  
9 anything here he cannot verify himself.

10 You may or may not remember that Mr. Kay testified  
11 on cross-examination regarding a situation that he had with  
12 Mr. Jensen and which he also believes Mr. Hessman was  
13 implicated in involving I cannot remember how he  
14 characterized it, but some irregularities that were taken  
15 with respect to a bank deposit in an effort to embarrass him  
16 in a civil action.

17 These documents are related to that, and Mr. Kay  
18 will be present to testify regarding that.

19 MR. SCHAUBLE: Your Honor, one of the problems I  
20 have with this is it seems to me if they were going to use  
21 that for this purpose, at a minimum Mr. Jensen was available  
22 and was never asked any questions or examined on this matter  
23 whatsoever.

24 MR. KELLER: Mr. Jensen was your witness at that  
25 point, number one. Number two, you had these documents. He

1 was listed as a witness. If you had some reason to do it,  
2 you could have done it.

3 Mr. Kay is able to say all we need to say about  
4 these documents. If you feel a need to recall Mr. Jensen to  
5 rebut it at that point, you certainly are free to make that  
6 motion.

7 MR. KNOWLES-KELLETT: Your Honor, if it is going  
8 to be used for rebuttal testimony, they should have given  
9 Mr. Jensen a chance to explain it. It is not our duty to  
10 try to discern from documents that do not explain what they  
11 are about how they are going to use them to rebut the  
12 testimony of Mr. Jensen.

13 MR. KELLER: I think it is not going to be to  
14 rebut his testimony. It is going to be to impeach his  
15 credibility.

16 These documents and the testimony associated with  
17 them will provide a specific example of dishonest and  
18 fraudulent conduct by Mr. Jensen against Mr. Kay. Also, the  
19 testimony will provide evidence that Mr. Hessman was  
20 possibly involved in concert with Mr. Jensen in that  
21 conduct. That is the relevance of them.

22 MR. SCHAUBLE: Your Honor, we would note that Mr.  
23 Kay testified to that. He admitted himself that he had  
24 suspicions that he could not prove.

25 MR. KELLER: No. He said he could not prove Mr.

1 Hessman's involvement. Mr. Jensen's involvement is well,  
2 with the testimony and the documents, beyond dispute.

3 I am not sure what my learned colleague is doing,  
4 but before we get beyond just the issue of impeachment, I  
5 think even if under some evidentiary principle this specific  
6 instance is arguably inadmissible for purposes of  
7 impeachment, which I would dispute, it is, nonetheless,  
8 certainly admissible for purposes of showing bias of the  
9 witness against Mr. Kay.

10 JUDGE CHACKIN: What is your position?

11 MR. SCHAUBLE: Your Honor, we do not believe this  
12 is relevant. I do not think there has been any  
13 demonstration of relevance to the issues here. I mean, he  
14 talks about impeachment, but there was nothing here that  
15 relates to any of Mr. Jensen's direct or cross-examination.

16 JUDGE CHACKIN: Well, it is not being used for  
17 that.

18 MR. KNOWLES-KELLETT: The Rules of Evidence, Your  
19 Honor, provide that if you are going to use specific  
20 instances of misconduct that you cannot use extrinsic  
21 evidence other than the conviction of a crime.

22 They may, however, in the discretion of the Court,  
23 and probative of truthfulness or untruthfulness, inquire  
24 into on cross-examination of the witness concerning the  
25 witness' character for truthfulness or untruthfulness or

1 concerning the character of truthfulness or untruthfulness  
2 of another witness to which the character of the witness  
3 being cross-examined has testified.

4 MR. KELLER: I will confess to not being up to  
5 speed on what exceptions to that apply except to say that --

6 JUDGE CHACHKIN: What rule was that?

7 MR. KNOWLES-KELLETT: 608(b), Your Honor.

8 MR. KELLER: But that does not address it for  
9 purposes of showing bias against the --

10 MR. KNOWLES-KELLETT: I would ask that you  
11 withhold --

12 MR. SHAINIS: My understanding is the Commission  
13 does not necessarily and has never adopted the Federal Rules  
14 of Evidence.

15 MR. KELLER: Not only does the Commission not  
16 adopt them; they are specifically not adopted in the FCC  
17 rules for a specific reason, and that is we do not have  
18 trials by jury with the FCC. They trust that the presiding  
19 officers are quite capable of separating the wheat from the  
20 shaft as it were.

21 MR. SCHAUBLE: Your Honor, the Commission in many  
22 cases has used the Federal Rules of Evidence. I agree they  
23 are not binding, Your Honor, but they are used as a handy  
24 guide in these sorts of situations.

25 MR. KELLER: I agree, but --

1           MR. KNOWLES-KELLETT: I would ask Your Honor to  
2 withhold ruling on this document until we could look into  
3 it, and we would make argument at the specific time when it  
4 is used when we understand the specific purpose for which it  
5 is being used.

6           MR. KELLER: I would just point out that the  
7 primary purpose of Rule 608(b) is to avoid prejudice of a  
8 juror. There are many rules in the Federal Rules of  
9 Evidence that certainly do have applicability and should be  
10 followed in FCC proceedings, but the rules are primarily  
11 designed to avoid prejudicing the jury. Those rules have  
12 limited value.

13           The trier of fact here already knows what we are  
14 talking about. It is just a question of whether it is going  
15 to be admitted on the record or not. The trier of fact is  
16 certainly skilled and capable of sorting out how it should  
17 be used and how it should not be used, so the same --

18           MR. KNOWLES-KELLETT: We disagree. The purpose of  
19 the rule is very clearly that the witness who is being  
20 impeached by extrinsic evidence gets a chance to confront  
21 the evidence again him.

22           MR. KELLER: Again, the --

23           MR. SCHAUBLE: Your Honor, there is another  
24 purpose here, too, and that is that FCC proceedings, you  
25 know, are governed by specific designated issues. There is

1 a danger that under the guise of impeachment we could end up  
2 deciding all sorts of things which really have no bearing on  
3 the issues. There are all sorts of ways as well.

4 It is impeaching or evidence of bias, but FCC  
5 procedure is rather clear that the idea is to stay within  
6 the issues that have been designated by the Commission or  
7 added by the presiding Judge in this proceeding.

8 JUDGE CHACKIN: What does that have to do with  
9 impeachment?

10 MR. SCHAUBLE: Your Honor, I do not think this is  
11 being offered as impeaching the testimony of Mr. Jensen.

12 MR. KELLER: It is being offered for two purposes.  
13 One, to impeach his credibility. To that extent, 608(b) is  
14 arguably applicable, although I would suggest that 608(b)  
15 has got a limited, if any, applicability in FCC proceedings.

16 It is also being offered, however, to show a  
17 specific example of bias by the witness against Mr. Kay. In  
18 that regard, I would suggest that 608(b) does not apply at  
19 all in any form.

20 MR. KNOWLES-KELLETT: I think, Your Honor, that  
21 that is straining the argument. I think they are trying to  
22 say that he was untruthful. To say that it is evidence of  
23 bias is to impeach his testimony.

24 JUDGE CHACKIN: That is two separate things.  
25 Bias and testifying falsely are two separate things. They

1 are not the same.

2 MR. KNOWLES-KELLETT: I think the same policy  
3 should apply, Your Honor, that he should get a chance to see  
4 the evidence against him and that --

5 JUDGE CHACHKIN: Well, apparently he did have a  
6 chance to see the evidence against him.

7 MR. KNOWLES-KELLETT: See, we do not know this  
8 evidence against him, Your Honor.

9 JUDGE CHACHKIN: Are you telling me you got this  
10 exhibit in June and --

11 MR. KNOWLES-KELLETT: We do not understand it,  
12 Your Honor. We did not depose --

13 MR. KELLER: Did you question Mr. Jensen about it?

14 JUDGE CHACHKIN: You did not question Mr. Jensen  
15 concerning this matter, even though it deals with Mr.  
16 Jensen. Whose fault is that?

17 MR. KNOWLES-KELLETT: Your Honor, we did not know  
18 this was proof.

19 JUDGE CHACHKIN: Pardon me?

20 MR. KNOWLES-KELLETT: You specifically ruled that  
21 we did not know that this would be an exhibit. We knew this  
22 was in the universe of documents. However --

23 JUDGE CHACHKIN: Well, you have these documents  
24 raising questions about Mr. Jensen, and you had him as a  
25 witness.



1 MR. SHAINIS: He was your witness.

2 JUDGE CHACHKIN: You did not ask him questions  
3 about this material?

4 MR. KNOWLES-KELLETT: The rule specifically  
5 requires them, if they are using it to impeach --

6 JUDGE CHACHKIN: You also --

7 MR. KELLER: Therefore, you must have assumed that  
8 we were going to present it to him. Therefore, you  
9 presumably would have asked him about it.

10 JUDGE CHACHKIN: Also, you had notice from Mr.  
11 Kay's own testimony, which preceded Mr. Jensen.

12 MR. KNOWLES-KELLETT: The only notice from Mr.  
13 Kay's testimony was that he could not prove that Kevin  
14 Hessman was involved in something.

15 JUDGE CHACHKIN: But we are talking about Mr.  
16 Jensen.

17 MR. KELLER: No, no, no, no, no. He also  
18 testified that Mr. Jensen had been involved in this scheme.

19 I do not want to say this for certain because I do  
20 not want to mis-state it, but I believe this matter was gone  
21 into in one of the two depositions of Mr. Jensen.

22 MR. KNOWLES-KELLETT: Yes.

23 JUDGE CHACHKIN: That would be more reason if it  
24 went in in the case of Mr. Jensen's deposition that you  
25 certainly are on notice that the matter might be raised.

1           MR. KNOWLES-KELLETT: Your Honor, I think and  
2           strongly believe it was their responsibility, not our  
3           responsibility, and I think that the rule provides that they  
4           are supposed to do it on cross-examination. I strongly  
5           believe it should be excluded.

6           MR. SHAINIS: Your Honor, they had --

7           JUDGE CHACHKIN: I do not know this nature of  
8           testimony, whether it is extrinsic or what it is, frankly.

9           MR. KNOWLES-KELLETT: Extrinsic refers to the use  
10          of documents, as opposed to testimony, Your Honor. I could  
11          be wrong.

12          JUDGE CHACHKIN: Extrinsic has nothing to do with  
13          use of documents. It deals with matters --

14          MR. KELLER: Other than what he specifically  
15          testified about.

16          MR. SHAINIS: They are certainly at liberty to  
17          bring Mr. Jensen back.

18          JUDGE CHACHKIN: Other than matters relating to  
19          the issues in the case, some extrinsic matter.

20                 For instance, if they brought up the bankruptcy of  
21          Mr. Jensen outside of the issues that is one thing, but here  
22          we are dealing with dealings with Mr. Kay apparently, so I  
23          do not understand why it is extrinsic. These are dealings  
24          directly with Mr. Kay. It is not something completely apart  
25          from --

1 MR. KNOWLES-KELLETT: Using your definition, Your  
2 Honor, this would be an extrinsic matter in that just  
3 because it is a dealing with Kay does not make it the  
4 subject of his testimony.

5 JUDGE CHACHKIN: Well, what I will do is I will  
6 withhold a ruling until I hear what Mr. Kay has to say, but  
7 I do not agree with you that you did not have notice that  
8 this matter was going to be inquired into.

9 If you fail, particularly if it was brought up  
10 during the deposition. You had the exhibit. This is your  
11 witness. Mr. Kay referred to it. If you do not deal with  
12 discussing with your own witness, I do not see how you can  
13 complain that it is brought up. You had your witness. You  
14 could have inquired from him as to this matter.

15 MR. KNOWLES-KELLETT: I think specifically it was  
16 their responsibility, Your Honor.

17 JUDGE CHACHKIN: Well, I am just telling you.

18 MR. KNOWLES-KELLETT: Okay. You are withholding  
19 ruling. At an appropriate time, we will raise our  
20 objections to the document.

21 JUDGE CHACHKIN: All right. What exhibit number  
22 was that?

23 MR. SHAINIS: That was 36.

24 MR. KELLER: That was 36, Your Honor.

25 JUDGE CHACHKIN: 36. Ruling withheld.

1 MR. SHAINIS: Your Honor, 37 has been admitted  
2 already as Kay Exhibit 1.

3 JUDGE CHACHKIN: All right. So you are not  
4 offering it?

5 MR. SHAINIS: Correct.

6 JUDGE CHACHKIN: There is no purpose in offering  
7 it.

8 MR. SHAINIS: That is correct.

9 JUDGE CHACHKIN: All right. 38?

10 MR. SCHAUBLE: No objection, Your Honor.

11 JUDGE CHACHKIN: 38 is received.

12 (The document referred to,  
13 having been previously marked  
14 for identification as Kay  
15 Exhibit No. 38, was received  
16 in evidence.)

17 JUDGE CHACHKIN: 39 is already in as WTB Exhibit  
18 351, so that is not offered.

19 MR. SCHAUBLE: 40 is in as Exhibit 7, Your Honor.

20 JUDGE CHACHKIN: 40?

21 MR. SCHAUBLE: What has been identified as 40.

22 JUDGE CHACHKIN: All right. 40 is already in the  
23 record as Kay Exhibit 7.

24 MR. SHAINIS: Was 38 admitted?

25 MR. SCHAUBLE: Yes, 38 was admitted.

1 MR. KNOWLES-KELLETT: No objection.

2 MR. SCHAUBLE: No objection.

3 MR. SHAINIS: And 39?

4 JUDGE CHACHKIN: So 40 is not offered.

5 MR. KELLER: 39 is not offered.

6 MR. SHAINIS: Okay.

7 JUDGE CHACHKIN: 41? Any objection to 41?

8 MR. SCHAUBLE: No objection, Your Honor.

9 JUDGE CHACHKIN: 41 is received.

10 (The document referred to,  
11 having been previously marked  
12 for identification as Kay  
13 Exhibit No. 41, was received  
14 in evidence.)

15 JUDGE CHACHKIN: 42?

16 MR. SHAINIS: It is already in as --

17 JUDGE CHACHKIN: 42 is already in, so that is not  
18 offered.

19 43?

20 MR. KNOWLES-KELLETT: It is loading cards, Your  
21 Honor. We have the same problem as we had with the other  
22 loading cards.

23 JUDGE CHACHKIN: All right.

24 MR. KNOWLES-KELLETT: I forget what we did with  
25 it.

1 JUDGE CHACHKIN: I received it.

2 MR. KNOWLES-KELLETT: I believe you admitted it  
3 over our objection --

4 JUDGE CHACHKIN: That is correct.

5 MR. KNOWLES-KELLETT: -- with leave to move to  
6 strike.

7 JUDGE CHACHKIN: That is true with respect to any  
8 exhibit. If you can demonstrate it is not relevant, you can  
9 move to strike.

10 43 is received.

11 (The document referred to,  
12 having been previously marked  
13 for identification as Kay  
14 Exhibit No. 43, was received  
15 in evidence.)

16 JUDGE CHACHKIN: 44?

17 MR. KNOWLES-KELLETT: Actually, can we go back to  
18 43 for one second? It may be that you guys can state more  
19 clearly the relevance with respect to the small number of  
20 loading cards. Otherwise this is fine.

21 MR. KELLER: Let me consult.

22 MR. KNOWLES-KELLETT: I only ask this, Your Honor,  
23 so we can save time later.

24 MR. KELLER: I need to consult with my client.

25 MR. KNOWLES-KELLETT: Fine.